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# IN THE
# COURT OF APPEALS OF INDIANA

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| KENT HICKSON, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 49A02-0610-CR-919 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant Hawkins, Judge
Cause Nos. 49G05-0409-FC-165238, 49G05-0409-FB-168400,
49G05-0409-FB-168420, 49G05-0409-FB-168435, 49G05-0409-FB-168444,
49G05-0409-FB-168454, 49G05-0409-FB-168463

**July 11, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## Case Summary

Appellant-Defendant Kent Hickson ("Hickson") appeals his sentence for Resisting Law Enforcement, as a Class C felony,[1] Auto Theft, as a Class D felony,[2] Failure to Stop After Accident Resulting in Bodily Injury, as a Class A misdemeanor,[3] and six counts of Burglary, as Class B felonies.[4] We affirm.

## Issue

Hickson raises the issue of whether his sentence is inappropriate.

## Facts and Procedural History[5]

On July 2, 2004, Hickson broke into a home on Johnson Road Marion County. Hickson gained entrance through a side window on an attached garage and took items, including a paint sprayer, power washer, hedge trimmer, grass trimmer, chainsaw, and grinder.

On July 9, 2004, Hickson broke into a home on Shelly Street via a sliding glass door. Hickson took property from the home, including a forty-four caliber handgun, combination TV/VCR, and power washer.

On July 15, 2004, Hickson broke into a home on North Franklin Road. Hickson was

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[1] Ind. Code § 35-44-3-3.

[2] Ind. Code § 35-43-4-2.5.

[3] Ind. Code § 9-26-1-1.

[4] Ind. Code § 35-43-2-1.

able to enter through an unlocked window on the attached garage. Items taken from the home include an air compressor, saw, toolbox, bicycle, and hand tools.

On August 4, 2004, Hickson broke into a home on Allisonville Road, taking articles including a chainsaw, joiner, air compressor, welder, and other tools.

The next day Hickson broke into another home on Allisonville Road, again removing a variety of tools among other items.

On August 11, 2004, Hickson broke into a home on Lafayette Road by prying open the front door with a crowbar. He took a plasma television, karaoke compact disk, casino piano, speakers, and miscellaneous items.

On September 13, 2004, Hickson stole a 2000 Ford pickup truck from Brian Rutledge and drove the truck through downtown Indianapolis. At some point, an Indianapolis Police officer ordered Hickson to stop the truck by engaging the emergency lights on the officer's squad car. Hickson continued to drive, running the pickup truck through a red light and crashing into another pickup truck. Both occupants of the other pickup truck suffered injuries, one sustaining a fractured femur. After the collision, Hickson fled the scene on foot.

Under separate cause numbers, the State charged Hickson with Burglary, as a Class B felony, and Theft, as a Class D felony,[6] for each instance where Hickson broke into a home and took property. The State also filed six charges against Hickson based on the September

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[5] We remind counsel for the defendant that the Statement of Facts section of an appellate brief "shall be in narrative form and shall not be a witness by witness summary of the testimony." Ind. Appellate Rule 46(A)(6)(c).

[6] Ind. Code § 35-43-4-2.

13, 2004 incident: Resisting Law Enforcement, as a Class C felony ("Count I"); Resisting Law Enforcement, as a Class D felony;[7] Auto Theft, as a Class D felony ("Count III"); Failure to Stop After Accident Resulting in Serious Bodily Injury, as a Class D felony;[8] Failure to Stop After Accident Resulting in Bodily Injury, as a Class A misdemeanor ("Count V"); Driving While Suspended with a Prior Violation, a Class A misdemeanor;[9] Resisting Law Enforcement, as a Class A misdemeanor;[10] Criminal Recklessness, as a Class A misdemeanor;[11] Failure to Stop After Accident Resulting in Property Damage to Vehicle, as a Class C misdemeanor;[12] and Resisting Law Enforcement, as a Class A misdemeanor.[13]

Hickson and the State entered into a plea agreement where Hickson would plead guilty to the six counts of burglary and Counts I, III, and V of the charges resulting from the September 13th incident. In return, the State would forego prosecution of the remaining charges. The plea agreement also provided:

> The parties also agree as part of the agreed resolution of this case that the State may argue at sentence aggravators involving other crimes committed by the defendant yet not charged. Those uncharged Marion County cases will be resolved by nature of this agreement, and those cases are memorialized on a separate disposition agreement between the parties.[14]

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[7] I.C. § 35-44-3-3.

[8] I.C. § 9-26-1-1.

[9] Ind. Code § 9-24-19-2.

[10] I.C. § 35-44-3-3.

[11] Ind. Code § 35-42-2-2.

[12] I.C. § 9-26-1-2.

[13] I.C. § 35-44-3-3.

[14] This separate agreement was not included in the record on appeal.

Appellant's Appendix at 56. The agreement provided that the initial executed portion of the sentence would be between fifteen and forty years. The parties were free to argue as to what was the appropriate sentence, including whether the sentences would be concurrent or consecutive.

The trial court accepted the plea agreement on January 28, 2005. At the sentencing hearing on February 18, 2005, the trial court sentenced Hickson for the September 13th incident to four years on Count I, one and one-half years on Count III, and one year on Count V. The sentences on these counts were to be served concurrently. As for the six counts of burglary, the trial court sentenced Hickson to ten years for each, to be served consecutively to each other and to the sentence for the September 13th incident. The trial court also suspended thirty years of the sentence and ordered probation for ten years, resulting in an initial executed sentence of thirty-four years. Finally, the trial court ordered judgments against Hickson on behalf of the persons who sustained damages as a result of the September 13th incident.

On September 19, 2006, Hickson filed a motion for permission to file a belated notice of appeal, which was granted. Hickson now appeals.

**Discussion and Decision**

On appeal, Hickson contends that his sentence is inappropriate. Specifically, he argues that this Court should revise his sentence, because Hickson presented ample mitigating evidence to justify a sentence towards the lower end of the agreed range. Although Hickson pled guilty to the nine charges according to a plea agreement, he can still

challenge the appropriateness of his sentence because the plea agreement was "open", leaving his sentence to the discretion of the trial court. See Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Pursuant to Indiana Appellate Rule 7(B), he seeks revision of his sentence.

Indiana Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." When reviewing a sentence pursuant to 7(B), the appellate court must give due consideration to the trial court's sentence due to the special expertise of the trial bench in making sentencing decisions. Purvis v. State, 829 N.E.2d 572, 588 (Ind. Ct. App. 2005), trans. denied, cert. denied, No. 05-8651, 74 USLW 3530 (Mar. 20, 2006).

The "nature of the offense" portion of the 7(B) standard speaks to the statutory presumptive sentence for the class of crimes to which the offense belongs.[15] See Williams v. State, 782 N.E.2d 1039, 1051 (Ind. Ct. App. 2003), trans. denied. In other words, the presumptive sentence is intended to be the starting point for the court's consideration of the appropriate sentence for the particular crimes committed. Id. The "character of the offender" portion of the standard refers to the general sentencing considerations and the relevant aggravating and mitigating circumstances. Id.

Hickson was convicted of six Class B felonies, one Class C felony, one Class D

[15] On April 25, 2005, statutory amendments took effect in order to bring Indiana's sentencing scheme in line with the rationale of Blakely v. Washington, 124 S. Ct. 2531 (2004) and its progeny. To that end, the

felony, and one Class A misdemeanor. Regarding the nature of the offenses, these crimes were committed within a relatively short period of two months and resulted in multiple victims. Hickson invaded six different homes. Furthermore, it appears that as time passed, Hickson became bolder in the size of the items he stole, the proximity of the homes he subsequently burglarized, and the point of entry into the home. At the end of his crime spree, Hickson stole a pickup truck, disregarded police orders to pull over, placed the public in danger by leading police on a chase through downtown Indianapolis, ran a red light, crashed into another truck, and continued to flee on foot. The trial court sentenced Hickson to the presumptive sentence for each felony and one year for the Class A misdemeanor. See Ind. Code §§ 35-50-2-5 (2004): 35-50-2-7 (2004), and 35-50-3-2 (2004). The trial court ordered the sentences for the convictions of burglary to be served consecutively to each other as well as to the sentence for the September 13th incident.

In regard to the character of the offender, the trial court did not find any aggravators or mitigators. Although Hickson's remorse, drug addiction, implicit agreement to pay restitution, and cooperation with the police in their investigation of the burglaries were touted as mitigating factors, the trial court declined the invitation to find any mitigating factors. On appeal, Hickson contends the reasons that his sentence is inappropriate are his remorse, the influence of drugs on his actions, the non-violent nature of the crimes, his minimal criminal history, and his cooperation with the police.

Remorse, or lack thereof, by a defendant often is something that is better gauged by a

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legislature has replaced the term "presumptive" with the term "advisory" in our statutory sentencing scheme.

trial judge who views and hears a defendant's apology and demeanor first hand and determines the defendant's credibility. Gibson v. State, 856 N.E.2d 142, 148 (Ind. Ct. App. 2006). Without evidence of some impermissible consideration by the trial court, we will accept its determination as to remorse. Johnson v. State, 855 N.E.2d 1014, 1016-1017 (Ind. Ct. App. 2006), trans. denied. Hickson does not allege any impermissible consideration, so we conclude that Hickson's expression of remorse does not necessitate a revision of his sentence.

The other suggested factors for reducing his sentence are not availing either. Hickson made a poor decision in choosing to start using drugs. He went beyond making just one poor decision by allowing his usage to continue and increase to a daily consumption of $200 worth of cocaine rather than seeking help. We are also not persuaded by Hickson's point that his crimes were non-violent. The lack of violence during the commission of burglary results in the defendant being charged with burglary as a Class B or C felony rather than a Class A felony. Hickson provides no explanation as to why in these particular circumstances the lack of violence for his Class B burglary convictions warrant a lesser sentence. Hickson also contends that he does not have a significant criminal history. Although not necessarily lengthy, Hickson's criminal history includes convictions for two felonies and three misdemeanors. We are not persuaded that this warrants a revision of Hickson's sentence.

Finally, there is the circumstance that Hickson aided police by identifying the locations of his crimes and the items he took. The police connected Hickson to the local

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However, Hickson was sentenced on February 18, 2005, prior to the amendment taking effect.

wave of burglaries by virtue of watching goods being sold to local pawnshops. After being found and read his Miranda rights at a local pawnshop, Hickson accompanied two detectives and identified the homes he had burglarized. There is no record that the detectives arrested Hickson at that point. Despite his cooperation, Hickson returned to his criminal ways by stealing the Ford pickup truck on September 13, 2004, and fleeing from law enforcement, resulting in a car crash.

Based on the foregoing, we are not persuaded that Hickson's sentence is inappropriate.

Affirmed.

SHARPNACK, J., and MAY, J., concur.